STATE OF INDIANA

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November 3, 2010

Hon. Rogelio Dominguez
2293 N. Main St.
Crown Point, IN 46307

Mr. William E. Nangle
The Times of Northwest Indiana
601 45th Ave.
Munster, IN 46321

Re: Consolidated Formal Complaints 10-FC-236 and 10-FC-241; Alleged Violations of the Open Door Law by the Lake County Solid Waste Management District

Dear Sheriff Dominguez and Mr. Nangle:

This advisory opinion is in response to your formal complaints alleging the Lake County Solid Waste Management District ("District") violated the Open Door Law ("ODL") I.C. § 5-14-1.5-1 *et seq*. Due to the similarity of allegations in your complaints, I have consolidated your complaints into this advisory opinion. A copy[1] of the District's response to the complaints is enclosed for your reference.

BACKGROUND

You allege that on September 23, 2010, the District conducted an executive session of its governing body that was closed to the public. The District provided notice as required by statute. The notice stated that the executive session was to involve discussion of threatened litigation. However, Sheriff Dominguez questions whether it was appropriate for the District to hold an executive session "without stating/listing any subject matter purpose nor describing any litigation, pending, threatened, nor initiation." He adds that the District "held an executive session to receive legal advice concerning the constitutionality of their actions and/or contracts."

[1] When combined with the associated attachments, the District's complete response to your complaints is quite lengthy. As a result, I have attached only the response itself, which contains a listing of the attachments included with the response. If you would like to receive a copy of any of the attachments, please contact my office and we will be happy to provide them to you.

Mr. Nangle notes that "the *Times* [*of Northwest Indiana*] believes that the matter discussed [at the executive session] was not, in fact, based on a threat of litigation as required by statute and that the District . . . should have conducted the public's business in an open atmosphere" Mr. Nangle claims that the actual topic of discussion at the executive session was a legal opinion provided by a law firm in response to the District's query regarding ownership of a waste-to-ethanol plant in Lake County. On October 1st, the District's attorney, Clifford Duggan, told a staff writer for *The Times* that the meeting was closed as a result of comments made by a representative of the National Solid Wastes [sic] Management Association. The District board later met with Mr. Duggan and announced that the District had been advised that Lake County could serve as owner of the plant. *The Times* believes that because there was no written threat of litigation against the District, the District's executive session was not appropriately held under the "threat of litigation" provision in the ODL.

Attorney Clifford Duggan, Jr. responded to your complaints on behalf of the District. Mr. Duggan

ANALYSIS

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. I.C. § 5-14-1.5-3(a).

Regarding notice, the ODL provides the following:

> Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. . .
>
> * * *
>
> Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). . .

I.C. §§ 5-14-1.5-5(a); 5-14-1.5-6.1(d). The District's notice for its September 23rd executive session reads,

> Executive Session
> Notice & Agenda
>
> The Lake County Solid Waste Management District, hereinafter District, shall hold an Executive Session, as allowed under I.C. 5-14-1.5-6.1(b)(2)(B), on Thursday, September 23, 2010 at 6:00 p.m. (local

> time) at the Lake County Government Center - Auditorium, 2293 North Main Street, Crown Point, Indiana for the following purpose:
>
> For discussion of strategy with respect to the following:
>
> The initiation of litigation or litigation that is either pending or threatened specifically in writing.

Here, the Board contends notice was posted in accordance with the ODL. I do not understand your complaint to include an allegation that sufficient notice was not posted for the executive session. Rather, you complain that the Board was not authorized to conduct an executive session to discuss the issues presented by Mr. Marcum's election and was not authorized to make a decision during an executive session about legal action relating to Mr. Marcum.

The Board contends it was authorized to conduct the executive session. Dr. Berry refers to "criteria #2B," "criteria #2A," and "criteria #4." While this is not the nomenclature generally used, I would interpret that to mean the Board relied on subsections (b)(2)(A), (b)(2)(B), and (b)(4) of I.C. § 5-14-1.5-6.1 as authorization to conduct the executive session to discuss Mr. Marcum's status and consider legal action.

I.C. § 5-14-1.5-6.1(b) provides, in part, the following:

> Executive sessions may be held only in the following instances:
>
> (2) For discussion of strategy with respect to any of the following:
> (A) Collective bargaining.
> (B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing. . .

The Board contends it was authorized to conduct an executive session on the basis of I.C. § 5-14-1.5-6.1(b)(2)(A) because the Board is currently involved in contract negotiations with the teachers' association. The Board contends that collective bargaining was discussed at the December 15 executive session. Certainly the Board is authorized to conduct an executive session to discuss strategy with respect to collective bargaining, pursuant to I.C. § 5-14-1.5-6.1(b)(2)(A).

Further, the Board contends it was authorized to conduct an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) to discuss strategy with respect to initiating litigation related to Mr. Marcum's election to the Board. This, too, was appropriate in my opinion, as I.C. § 5-14-1.5-6.1(b)(2)(B) specifically authorizes the Board to discuss strategy with respect to initiating litigation, which is what the Board was considering.

Finally, the Board contends it was authorized to conduct an executive session on the basis of I.C. § 5-14-1.5-6.1(b)(4) to discuss the interview materials of candidates for superintendent. In my opinion, the Board incorrectly cited I.C. § 5-14-1.5-6.1(b)(4), which authorizes an executive session for interviews and negotiations with industrial or commercial prospects. Hiring a superintendent does not fall under this exception. In my

opinion this is a technical violation of the ODL, though, because I.C. § 5-14-1.5-6.1(b)(5) does allow an executive session to "receive information about and interview prospective employees." If during the executive session the Board received information about superintendent candidates, in the form of application or interview materials, that conduct would be authorized by I.C. § 5-14-1.5-6.1(b)(5).

As such, it is my opinion the Board was authorized to conduct an executive session on December 15 to discuss matters which fell under these three instances, so long as notice was posted in accordance with I.C. § 5-14-1.5-5 and I.C. § 5-14-1.5-6.1(d).

You allege that the Board made decisions during executive session and those decisions should have been made during an open meeting. A final action must be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c). "Final action" means a vote by a governing body on a motion, proposal, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). If the Board made the decision during executive session to initiate litigation, that action would have been permissible pursuant to *Baker v. Town of Middlebury,* 753 N.E.2d 67 (Ind. Ct. App. 2001), so long as a vote was not taken at the executive session.

In *Baker,* Town Marshal Baker alleged that during an executive session to discuss his job performance, the Town Council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not "final action" and that creating the list did not go beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the "final action" consisted of the Council's vote at the public meeting. *Id*. at 71. Similarly, any decisions made by the Board during executive session in the present matter would not constitute final action. Final action was the vote on the motion to proceed with the two-pronged approach, and that vote was taken during a meeting open to the public.

Further, you allege the Board violated the ODL when it declined to answer your questions posed at its December 15 public meeting. Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *Brademas v. South Bend Cmty. Sch. Corp*., 783 N.E.2d 745 (Ind. Ct. App. 2003), *trans. denied*, 2003. Further, nothing in the ODL requires that if an agency does allow a person to speak, it must answer questions posed. As such, it is my opinion the Board did not violate the ODL by declining to answer your questions.

Finally, you raise issues related to the superintendent's actions working with the attorney. Nothing in the ODL or other public access law addresses which duties fall upon a Board and which duties may be carried out by the superintendent. As such, this issue is outside the purview of this office.

CONCLUSION

For the foregoing reasons, it is my opinion that the Facility has not carried its burden of proof to demonstrate that the records you requested are exempt from disclosure under the APRA.

Best regards,

Andrew J. Kossack
Public Access Counselor